DIMEO v. MAX Doc. 7

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY DIMEO, III,	:	
	:	
Plaintiff,	:	
	:	**No. 06-1544**
v.	:	
	:	
TUCKER MAX	:	
	:	
Defendant.	:	

ORDER

AND NOW, this ____ day of _______________, 2006, upon consideration of Plaintiff's Motion for Leave to Amend Complaint, and defendant's response thereto, it is hereby ORDERED that the motion is DENIED.

BY THE COURT:

____
The Honorable Stewart Dalzell

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ANTHONY DIMEO, III,	:	
	:	
Plaintiff,	:	
	:	**No. 06-1544**
v.	:	
	:	
TUCKER MAX	:	
	:	
Defendant.	:	

DEFENDANT'S OPPOSITION TO
PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

Pursuant to the Court's May 3, 2006 Order, defendant Tucker Max, by and through his undersigned counsel Montgomery, McCracken, Walker & Rhoads, LLP, respectfully submits this memorandum of law in opposition to plaintiff's motion for leave to amend his Complaint.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff seeks leave of Court to file an amended Complaint that will drop one cause of action and add two others – one for intentional infliction of emotional distress and the other for violations of the federal RICO statute.[1]

Significantly, plaintiff did not attach to his "motion" the proposed amended Complaint, nor did he describe the basis for his new claims. In fact, plaintiff's actual "motion" is contained only in the last two sentences of his response to defendant's motion to dismiss and it does not cite to a single authority. This renders plaintiff's "motion" defective, and thus it should be denied. *See Ramsgate Court Townhome Assoc. v. West Chester Borough*, 313 F.3d 157, 161 (3d Cir. 2002); *In re:*

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[1] Plaintiff was not required to seek leave of Court to amend his Complaint because, under Federal Rule of Civil Procedure 15(a), he was entitled to amend once as a matter of right before a responsive pleading was served. Because a motion to dismiss is not a pleading, plaintiff could have amended his Complaint without leave. However, because plaintiff has requested leave of Court, this should be treated as a case in which leave of Court is required. *Centifanti v. Nix*, 865 F.2d 1422, 1431 (3d Cir. 1989).

Cigna Corp. Sec. Litig., Civ. A. No. 02-8088, 2006 U.S. Dist. Lexis 13205, at *17 (E.D. Pa. Mar. 24, 2006).

Plaintiff's request to file an amended Complaint also should be denied as any such amendment will be futile. Plaintiff has not – and cannot – plead facts sufficient to support any claim, whether for defamation, intentional infliction of emotional distress or violations of the RICO statute. Moreover, the Communications Decency Act ("CDA") provides immunity to defendant in this case since he did not author the "posts" at issue. Thus, the Court should deny plaintiff's "motion" for leave to file a new Complaint.

II. FACTUAL BACKGROUND

On or about April 25, 2006, plaintiff filed with the Court a single document that purports to be both an opposition to defendant's motion to dismiss the Complaint and a motion for leave to amend the Complaint (the "Pleading").

Plaintiff proposes to withdraw Count II of the original Complaint – violation of the Communications Act of 1943, specifically the Violence Against Women Act (the "VAWA") – and add claims for intentional infliction of emotional distress and violations of the federal RICO statute.[2] *See* Pleading at 5-6. The Pleading does not contain the proposed amended Complaint and plaintiff has not described in any detail the grounds for his new causes of action.

Plaintiff has asserted, however, a few new allegations in the Pleading, none of which is supported by any evidence. For example, plaintiff claims that defendant published on his Internet website plaintiff's phone number and e-mail, his "aunt's private phone number" and

[2] Although plaintiff does not explain why he wishes to voluntarily withdraw the VAWA claim, it is obvious that he has now realized that there is no private cause of action under that Act. This is an issue that plaintiff and his counsel should have addressed **before** the Complaint was filed, not **after** it was raised in a letter to plaintiff's counsel weeks before the motion to dismiss was filed. *See* Exhibit A, March 28, 2006 letter from Michael K. Twersky to Matthew B. Weisberg.

pictures of his niece, and that he has received "death threats ... and harassing phone calls." *Id.* at 1-2.

Plaintiff does not allege that defendant authored the "posts" containing the phone numbers or his niece's picture, and he has not attached these "posts" to the Pleading. In fact, defendant denies that such information was "posted" by anyone on his website. Plaintiff also does not claim that defendant made any threats to him or made the "harassing phone calls," and defendant denies that he has threatened plaintiff in any manner.

III. LEGAL ARGUMENT

Plaintiff did not attach to his "motion" a proposed amended Complaint or provide any details as to the basis for it. Nevertheless, his proposed new claims, like his old claims, have no basis in law or fact. His "motion," which consists of two lines at the very end of the Pleading, is both procedurally and substantively deficient, and it should be denied.

A. Plaintiff's Motion for Leave to Amend his Complaint Should be Denied Because it is Procedurally Deficient.

Plaintiff's "motion" is woefully inadequate under the Federal Rules of Civil Procedure. As a motion, it must comply with both Rule 7 of the Federal Rules of Civil Procedure and Rule 7.1 of the Local Rules of this Court. Federal Rule of Civil Procedure 7 requires that a motion "state with particularity the grounds" that form the basis of the motion. Local Rule 7.1 further requires that all uncontested motions be "accompanied by a brief containing a concise statement of the legal contentions and authorities relied upon in support of the motion."

Plaintiff's "motion" does not comply with either of those Rules. Instead, plaintiff's request to amend the Complaint is nothing more than an afterthought – two sentences at the very end of the Pleading. He does not attach a draft of the proposed amended Complaint nor does he explain in any detail the grounds for his proposed new claims. Thus, he has not offered the Court anything to consider in deciding the "motion."

The United States Court of Appeals for the Third Circuit and courts in this District have rejected "motions" exactly like the one plaintiff has filed. Indeed, less than two months ago, in an opinion authored by Judge Baylson, the court held that "a bare request in opposition to a motion to dismiss – without any indication of the particular grounds on which the amendment is sought…does not constitute a motion within the contemplation of Rule 15(a)." *In re: Cigna Corp. Sec. Litig.*, Civ. A. No. 02-8088, 2006 U.S. Dist. Lexis 13205 at *17 (E.D. Pa. Mar. 24, 2006) (*quoting In re NAHC Sec. Litig.*, 306 F.3d 1314, 1332 (3d Cir. 2002). The holding in *Cigna* follows the Third Circuit's holding in *Ramsgate Court Townhome Assoc. v. West Chester Borough*, 313 F.3d 157, 161 (3d Cir. 2002), in which the court found a motion to amend was inadequate because it consisted of a single sentence at the conclusion of brief in opposition to the motion to dismiss.

Here, plaintiff's "motion" for leave to amend his Complaint is identical to the "motions" considered – and rejected – in *Ramsgate* and *Cigna*. Accordingly, this Court should reject plaintiff's "motion" in this case.

B. Plaintiff's "Motion" To Amend The Complaint Should Be Denied Because Any Amendment Will Be Futile.

In addition to the procedural deficiencies in plaintiff's "motion," it suffers from fatal substantive flaws that independently require it to be denied. Specifically, leave to amend should be denied where, as is the case here, "it is apparent from the record that: (1) the moving party has demonstrated undue delay, bad faith, dilatory motives; (2) the amendment would be futile; or (3) the amendment would prejudice the other party." *Lake v. Arnold*, 232 F.3d 360, 373 (3d Cir. 2000).

Here, any amended Complaint filed by plaintiff will be futile because it cannot cure the deficiencies in the original Complaint and plaintiff has no basis to assert any other claims against defendant, including his two new proposed causes of action for intentional infliction of emotional distress and violations of the federal RICO statute.[3]

The only new allegations contained in plaintiff's "motion" is that defendant published on his website (but did not author) his phone number and e-mail address, his "aunt's private phone number" and pictures of his niece, and that plaintiff has received "death threats ... and harassing phone calls." Plaintiff's Memorandum of Law at 1-2.

These new allegations, however, do not cure the deficiencies in plaintiff's defamation claim. As an initial matter, it is not defamatory to publish a phone number or a picture. More importantly, plaintiff does not have standing to assert any claims, including one for defamation, on behalf of his aunt, niece or any other member of his family. Similarly, plaintiff's allegation that he received "death threats ... and harassing phone calls" does not give rise to cause of action for defamation against defendant. Indeed, plaintiff has alleged no connection between these alleged acts and defendant, and he cannot allege any such connection because defendant had nothing to do with such acts.

Moreover, defendant cannot be liable to plaintiff – whether for defamation, intentional infliction of emotional distress or any other tort claim – based on "posts" authored by third-parties that were published on his Internet website because he is immune from such liability by the express terms of the CDA. *See, e.g.,* 47 U.S.C. § 230(c)(1); *Green v. AOL*, 318 F.3d 465 (3rd Cir. 2003); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003); *Ben Ezra, Weinstein & Co. v.*

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[3] "In assessing 'futility,' the Court applies the same standard of legal sufficiency used in 12(b)(6) motions." *DiCicco v. Willow Grove Bank*, 308 F. Supp. 2d 528, 532 (E.D. Pa. 2004).

America Online, Inc. 206 F.3d 980 (10th Cir. 2000); *Zeran v. America Online, Inc.*, 129 F.3d 227 (4th Cir. 1997); *Parker v. Google, Inc.*, Civ. A. No. 04-CV-3918, 2006 WL 680916 (E.D. Pa. Mar. 10, 2006); *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.C. Cir. 1998); *Donato v. Moldow*, 865 A.2d 711 (N.J. Super. 2005).

Plaintiff's new allegations also do not give rise to a cause of action against defendant for intentional infliction of emotional distress. To prove such a claim, plaintiff must establish that defendant's conduct: (1) was extreme and outrageous; (2) was intentional or reckless; (3) caused emotional distress; and (4) that the distress was severe. *Hoy v. Angelone*, 691 A.2d 476, 482 (Pa. Super. 1997), *aff'd* 720 A.2d 745 (Pa. 1998) (quoting *Hooten v. Pa. Coll. of Optometry*, 601 F. Supp. 1151, 1155 (E.D. Pa. 1984)).

Courts do not allow recovery for a claim of intentional infliction of emotional distress, except for "only the most egregious conduct." *Hoy v. Angelone*, 720 A.2d 745, 754 (Pa. 1998). In fact, "the conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society."[4] *Id.* at 754 (quoting *Buczek v. First Nat'l Bank of Mifflintown*, 531 A.2d 1122, 1125 (Pa. Super. 1987)). The only conduct at issue here is the "posting" of constitutionally protected comments that have offended plaintiff. There can be no claim for intentional infliction of emotional distress against defendant for that.[5]

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[4] Cases in which intentional infliction of emotional distress claims were upheld are significant to demonstrate just how egregious the conduct must be for a finding of liability. *See Papieves v. Lawrence*, 263 A.2d 118 (Pa. 1970) (finding intentional infliction of emotional distress where defendant struck and killed plaintiff's son with a car, failing to notify authorities or seek medical assistance and burying the body in a field); *Banyas v. Lower Bucks Hosp.*, 437 A.2d 1236 (Pa. Super. 1981) (finding basis for claim where defendant intentionally fabricated records to suggest that plaintiff killed someone, leading to plaintiff's indictment for homicide). There is no conduct alleged in this case that is even remotely similar to the conduct in *Papieves* and *Banyas*.

Plaintiff's proposed RICO claim fares no better – plaintiff has not (and cannot) plead any facts to support such a claim. For example, there are no allegations that defendant was "associated with" an enterprise and that he was "aware of the general nature of the enterprise and knows that it extends beyond his individual role." *United States v. Parise*, 159 F.3d 790, 796 (3d Cir. 1998). Plaintiff also has not alleged that defendant "participated in" conduct of an enterprise's affairs through a "pattern" of "racketeering activity." *Reves v. Ernst & Young*, 507 U.S. 170, 184 (1993); *University of Maryland v. Peat, Marwick, Main & Co.*, 996 F.2d 1534, 1539 (3d Cir. 1993). Finally, there are no allegations that defendant engaged in any of the predicate acts required to support a RICO claim. *See* 18 U.S.C. 1961.

In short, plaintiff's attempt to plead a RICO claim against defendant would be futile since there are no facts to support such a claim. Indeed, there simply is no way to make a racketeering claim out of constitutionally protected comments on an Internet message-board that lampoon plaintiff.

To allow plaintiff leave of Court to amend his Complaint would not only be futile, it would force defendant to waste more time and money responding to it, and it would force the Court to rule on the propriety of plaintiff's new claims. Accordingly, plaintiff's "motion" for leave should be denied.

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[5] In addition, plaintiff cannot assert an intentional infliction of emotional distress claim based on statements that are constitutionally protected – it is a blatant attempt by plaintiff to plead via one tort claim (intentional infliction) that which he is prohibited from doing through another tort claim (defamation). *See Hustler Magazine v. Flawell*, 485 U.S. 46 (1988).

IV. CONCLUSION

For the reasons set forth herein defendant respectfully urges the Court to deny plaintiff's request to file an amended Complaint.

Respectfully submitted,

MT 829

Dated: May 8, 2006

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EXHIBIT A

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March 28, 2006

BY FACSIMILE
AND REGULAR MAIL

Matthew B. Weisberg, Esquire
Prochniak Poet & Weisberg, P.C.
7 South Morton Avenue
Morton, PA 19070

Re: DiMeo v. Max, March Term, 2006, No. 1576
Philadelphia County Court of Common Pleas

Dear Mr. Weisberg:

This law firm represents the defendant, Tucker Max, in the above-captioned litigation. This letter serves as notice pursuant to Rule 1023.1 of the Pennsylvania Rules of Civil Procedure that the claims set forth in the Complaint filed by your client, Anthony DiMeo III, have absolutely no basis in law and are without merit. Therefore, we demand that your client voluntarily dismiss his Complaint with prejudice by April 3, 2006. If your client refuses to comply with this demand, we intend to seek all appropriate relief and sanctions available.

The Complaint alleges that Mr. Max defamed plaintiff and violated a federal statute based on information that appeared on Mr. Max's Internet website. *See* Complaint at ¶¶ 5, 13-14. As a result, plaintiff has asserted three separate causes of action against Mr. Max, none which are cognizable under Pennsylvania or federal law.

First, as you must aware, section 230(c) of the Communications Decency Act ("CDA") provides "immunity to … a publisher or speaker of information originating from another information content provider. The provision '**precludes courts from entertaining claims that**

would place a computer service provider in the publisher's role,' and therefore bars **'lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions – such as deciding whether to publish, withdraw, postpone, or alter content.'"** *Green v. American Online*, 318 U.S. 465, 471 (3d Cir. 2003) (emphasis in original) (citations omitted).

The Third Circuit is not alone in holding that the CDA provides immunity from tort liability to mere "publishers" of information, like Mr. Max, who post information created by third parties. *See, e.g., Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003); *Ben Ezra, Weinstein & Co. v. America Online, Inc.*, 206 F.3d 980 (10th Cir. 2000); Blumenthal v. Drudge, 992 F. Supp. 44 (D.C. Cir. 1998); *Zeran* v. *America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)).

Although you did not attach the offending statements to the Complaint, which is required under Pennsylvania law, even a cursory review of those statements reveals that they are "messages" posted on a "message board" maintained on Mr. Max's website. Mr. Max, as the computer service provider, did not "create" any of the "messages" identified in the Complaint, and, therefore, he is immune from liability for any tort, including defamation, as a result of the "messages."

Second, aside from the obvious constitutional problems that arise from the allegations that Mr. Max violated the Communications Act of 1943, Count II of the Complaint, like Count I, is riddled with flaws. As an initial matter, 47 U.S.C. § 233(a)(1)(c) does not provide a private right of action for your client. To the contrary, that provision of the Communications Act provides only for criminal sanctions and civil fines by the Federal Communications Commission, not civil actions by private citizens. Consequently, plaintiff is prohibited from proceeding with his civil claim alleging a violation of that federal statute. Moreover, the offending "messages" were not sent to plaintiff by Mr. Max; rather, they were created by third parties and posted on a "message board" maintained by Mr. Max. Indeed, it seems likely that plaintiff took affirmative steps to locate and read the offending "messages" from Mr. Max's website, and then sued him without ever actually "receiving" the messages from my client. In addition, and yet another independent reason why Count II is fatally flawed, 47 U.S.C. § 233(a)(1)(c) does not apply to "interactive computer services" such as Mr. Max's "message board." *Id.* at § 233(h)(1)(B) and (h)(2). For all of these reasons, Count II of the Complaint is without merit.

Finally, Count III, styled as a claim for "Punitive Damages," is not a cause of action but a request for a specific type of relief. Accordingly, it cannot stand alone and is incorporated, if anywhere, as part of plaintiff's defamation claim, which itself is improper given the immunity provision of the CDA.

As you are well aware, your signature on the Complaint and Verification "constitutes a certificate that … the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law [and that] the factual allegations have evidentiary support, or if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Pa. R. Civ. P. 1023.1(c)(2) and (3); *see also* Fed. R. Civ. P. 11(b) (similar standard).

It is obvious that you cannot meet that standard and that this case should never have been filed. Indeed, given the relationship between plaintiff and Mr. Max, it is clear that this litigation was instituted solely "for an[ ] improper purpose, such as to harass" Mr. Max and force him to spend time and money defending against plaintiff's frivolous claims. *See* Pa. R. Civ. P. 1023.1 (c)(1). Therefore, under the Pennsylvania Rules of Civil Procedure we demand that your client dismiss this action with prejudice by no later than April 3, 2006. If your client fails to comply with this demand, we intend to seek appropriate sanctions as provided under Pennsylvania law against all culpable parties.

Sincerely,

Michael K. Twersky

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of May 2006, a true copy of the foregoing Defendant's Opposition to Plaintiff's Motion for Leave to Amend Complaint was sent by First Class U.S. Mail, postage prepaid, to the following:

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MT 829

Michael K. Twersky